86-626

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN AND MACY TRENT,
Petitioners,

vs.

CODMAN AND SHURTLEFF, INC., DR. JOSEPH SCHLONSKY, ST. ANTHONY'S HOSPITAL, and JOHNSON AND JOHNSON, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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QUESTION PRESENTED

Whether Petitioners were denied due process of law under the Fourteenth Amendment to the United States Constitution when their Complaint was dismissed on the technicality that Defendant, Dr. Joseph Schlonsky, was not put on notice of the claims against him even though the Original Complaint and three Amended Complaints, consisting of 177 paragraphs, setting forth each operation, were fully incorporated into each Amended Complaint, and filed within the one year statute of limitations period.

PARTIES

The parties named in the caption are the only parties to this action.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioners hereby request that this Court issue a Writ of Certiorari to review a judgment of the Supreme Court of Ohio entered on March 5, 1986 and denying Rehearing on May 14, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals of Franklin County, Ohio, Tenth Appellate District, *John Trent, et al. vs. Codman and Shurtleff, Inc., et al.*, No. AP-178, which Opinion is re-printed as Appendix A, pp. A33 to A43 of this Petition.

JURISDICTION

The judgment of the Supreme Court of Ohio denying review and denying a Rehearing, Appendix A, p. A1 was entered on May 14, 1986.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257(3).

STATUTES AND RULES INVOLVED

Section 2305.11, Ohio Revised Code, provides in part as follows:

> An action for . . . malpractice against a physician, podiatrist, or a hospital . . . shall be brought within one year after the cause thereof occurred. . .

(Appendix A, pp. A44-A45)

Rule 10(C), Ohio Rules of Civil Procedure, provides for adoption of a prior complaint by reference:

> *Adoption by Reference; Exhibits.* Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.

(Appendix A, p. A46)

Rule 12(E), Ohio Rules of Civil Procedure, allows a party to request a more definite statement if a pleading is vague:

> *Motion For Definite Statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move

for a definite statement before interposing his responsive pleading.

(Appendix A, p. A46)

Rule 15(C), Ohio Rules of Civil Procedure, allows an amended complaint to relate back to the original transaction complained about:

> *Amended And Supplemental Pleadings.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to set forth in the original pleading, the amendment relates back to the date of the original pleading.

(Appendix A, p. A46)

STATEMENT OF THE CASE

On January 27, 1978, Petitioner, John Trent underwent a *right* total hip arthroplasty performed by Dr. Joseph Schlonsky at St. Anthony's Hospital. On December 3, 1979, Petitioner underwent a *left* total hip arthroplasty, again performed by Dr. Schlonsky. During each of these procedures, Dr. Schlonsky inserted a prosthesis not recommended by the manufacturer for insertion in a patient weighing in excess of 126 pounds:

> The Standard Stem design is indicated for use in patients who are within normal limits of weight, activity and age. For those patients whose femoral neck is absent, a Straight Thick Stem or Straight Narrow Stem prosthesis may be indicated. When there is a chance of an over lengthening the leg in patients of small dimensions, the 3/4 Neck Straight Thick Stem prosthesis may be required. *It is recommended that*

the Straight Narrow Stem and Straight Thick Stem, 3/4 Neck prosthesis not be used in patients weighing more than 126 pounds.

It was undisputed that Petitioner weighed 140 and 141 pounds, respectively, at the time of each operation.

In January of 1980, the prosthesis inserted on January 27, 1978 broke and a second larger prosthesis was implanted in February of 1980. On December 24, 1981, the prosthesis inserted on December 3, 1979 also broke and was replaced.

On November 13, 1981, Petitioners filed suit against Codman and Shurtleff, Inc. and Johnson and Johnson, Inc., manufacturers and distributors of the prosthesis and St. Anthony's Hospital, as sellers of the prosthesis, alleging negligent design, negligent manufacture and breach of warranties. (Appendix A, pp. A3-A13) This Complaint was amended on April 13, 1982. (Appendix A, pp. A14-A24)

After consulting an expert from Cleveland, Ohio Petitioners first learned of the *gross mistake* made by Dr. Schlonsky. An amended complaint was then filed on October 6, 1982 to allege Dr. Schlonsky's negligence. (Appendix A, pp. A25-A28) This Complaint incorporated by reference the *three* prior complaints as permitted by Civ. R. 10(C) and reads in part as follows:

THIRD AMENDED COMPLAINT
COUNT I

1. Plaintiffs hereby incorporate Paragraphs 1-67 of their original Complaint as if fully set out and re-written herein.

2. Said Paragraphs 1-67 of the original Complaint were filed with the Court of Common Pleas on November 23, 1981.

COUNT II

3. Plaintiffs hereby incorporate Paragraphs 1-67 of their Tendered Amended Complaint as if fully set out and rewritten herein.

4. Said Paragraphs 1-67 were filed with the Court of Commons Pleas on April 13, 1982.

COUNT III

5. Plaintiffs hereby incorporate Paragraphs 1-21 of their Tendered Amended Complaint as if fully set out and rewritten herein.

6. Said Paragraphs 1-21 were filed with the Court of Common Pleas on or about the 16th day of June, 1982.

COUNT IV

7. Plaintiffs hereby incorporate Paragraphs 1-6 as if fully set out and rewritten herein.

The Third Amended Complaint alleged negligence against Dr. Schlonsky as follows:

20. Except for the fact that the prosthesis broke at or about the femur, Plaintiff John Trent would not have suffered and incurred the damages above.

21. Defendant, Dr. Joseph Schlonsky negligently prepared, or caused to be prepared, handled, inserted, and/or monitored the prosthesis implanted into Plaintiff John Trent.

22. Defendant, Joseph Schlonsky's negligent actions were the direct and proximate cause of the

breaking of the prosthesis after implantation into the Plaintiff's femur.

22. (sic) But for the negligence of the Defendant, Dr. Joseph Schlonsky, Plaintiff Johnson Trent, would not have sustained the above out-lined damages.

Those pertinent paragraphs previously incorporated by reference read as follows:

> As a result of the prosthesis failure of December, 1981 and the resulting replacement of said prosthesis, John Trent experienced *great trauma, anxiety,* and *pain* relating to the second operation of his *left* hip, all of which would not have occurred except for the fact that the prosthesis implanted by *Dr. Joseph Schlonsky* of Columbus, Ohio in December of 1979 completely severed or otherwise failed.

(Emphasis added; paragraph 7, Tendered Amended Complaint)

> As a result of the second operation on Plaintiff's *left* hip, Plaintiff developed, and will develop a *severe limp* and is unable to return to his occupation.

(Emphasis added; paragraph 8, Tendered Amended Complaint)

Despite the "notice" requirements of the Ohio and Federal Rules of Civil Procedure, the Ohio court dismissed Petitioners' claim for malpracticc with respect to the left hip finding that Defendant was not sufficiently notified of Petitioners' Claim.

THE STATE COURT AND APPELLATE COURT DECISIONS

The Trial Court and Appellate Court held that the Third Amended Complaint filed in October of 1982 did not sufficiently state a cause of action for negligent treatment of the Petitioner's left hip. The Supreme Court of Ohio refused to accept the Petitioners' appeal for further review.

REASONS FOR ALLOWING THE WRIT

Petitioners were denied due process of law when their Complaint was dismissed on a pleading technicality when, in fact, the spirit of the Ohio and Federal Rules of Civil Procedure promote a liberal policy of substance over form to insure cases are decided on their merits. This Court has stood firmly behind the liberal pleading policy:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

(*Conley v. Gibson*, 355 U.S. 41, pp. 45-46)

Petitioners were denied their day in Court on a pleading defect so technically applied as to defy a sense of fairness and justice. By taking from Petitioners their right to present their substantial claim of malpractice, Petitioners have been denied due process.

An action for medical malpractice must be brought within one year after the cause thereof accrued. R.C.

2305.11(A). (Appendix A, pp. A44-A45) A cause of action for medical malpractice accrues when the patient discovers the resulting injury. *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.2d 111.

The Court below found that Petitioner's cause of action for negligent treatment of the left hip accrued in December, 1981, when the left prosthesis broke, but that the Third Amended Complaint, filed in October, 1982, was untimely as to the left hip because it was insufficient to state a cause of action as to the left hip. A review of the pleadings reveals a cause of action was sufficiently stated as to the left hip in Count IV of the Third Amended Complaint, filed in October, 1982.

Pursuant to Rule 10(C), Ohio Rules of Civil Procedure, Count IV of the Third Amended Complaint properly incorporated the allegations contained in the prior Complaints. Rule 10(C) provides in relevant part, as follows:

> Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading.

(Appendix A, p. A46)

Thus, the statements and allegations contained in the prior complaints were properly incorporated by reference into Count IV of the Third Amended Complaint which alleged as follows:

> – On or about March 5, 1982, John Trent underwent a *left* total hip replacement arthoplasty at Riverside Hospital, the said operation being performed by Dr. John S. Wolfe.

– Plaintiff, John Trent, experienced great pain and anguish as a result of said operation, was required to convalesce (and is convalescing) for a number of months, the duration of same unknown at this point.

– The *left* hip replacement was necessary due to the failure of the prosthesis, which prosthesis broke in December of 1981.

– Plaintiff, John Trent, once earlier had his *left* hip replaced with a prosthesis in December of 1979, said operation being performed by *Dr. Joseph Schlonsky.*

– As a result of the prosthesis failure of December, 1979, and the resulting replacement of said prosthesis, John Trent experienced great trauma, anxiety and pain relating to the second operation of his *left* hip, all of which would not have occurred except for the fact that the prosthesis implanted by *Dr. Joseph Schlonsky* of Columbus, Ohio in December of 1979 completely severed or otherwise failed.

– As a result of the second operation on Plaintiff's *left* hip, Plaintiff developed, and will develop, a severe limp, and is unable to return to his occupation.

– Plaintiff, John Trent, is 53 years of age with a life expectancy of 83 years of age and, as a result of the prosthesis break, the second operation and the permanent injury will incur a wage loss of an additional $500,000.00.

– Plaintiff incurred a new hospital bill at Riverside Hospital as result of the second operation required on his *left* hip in the approximate sum of $15,000.00.

– As a direct and proximate cause of the prosthesis break on Plaintiff's *left* hip, Plaintiff cannot gain

> employment, has suffered great pain and anguish all to his additional damage and detriment in the sum of $600,000.00.
>
> – But for the *negligence of the Defendant, Dr. Joseph Schlonsky,* Plaintiff John Trent would not have sustained the above out-lined damages.

(Emphasis added; paragraph 3 through 11, Tendered Amended Complaint, filed April 14, 1982, and paragraph 22, Third Amended Complaint, filed October 6, 1982)

The above allegations, filed October 6, 1982, sufficiently state a claim against Defendant Schlonsky as to the left hip. These allegations were timely filed within one year of the December, 1981 accrual date. Thus, Respondent, Schlonsky, was put on notice of Petitioners' claims regarding both hips.

Pleadings are assigned the limited role of providing notice to the adverse party; discovery is the technique available to paint a more detailed picture of the facts and issues. As stated above, this Court has sanctioned a very liberal policy that a complaint should not be dismissed unless "it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson, supra.*

Judge Cardozo in *United States v. Memphis Cotton Oil* (1933), 288 U.S. 62, supports Petitioners' claims that they were denied their day in Court:

> . . . when a defendant has been put on notice from the beginning that the plaintiff set up and is trying to enforce a claim against it because of specific conduct, the reasons for the statute do not exist . . . and a liberal rule should be applied.

John Trent and his wife, Macy, were denied due process of law when the Court below ruled that their combined Complaints, consisting of 177 separate paragraphs, did not put Defendant Schlonsky on notice of the alleged negligence to both the left and right hip procedures.

This Court should accept this case to undo a very great injustice and thus follow the rule of law set down in *Foman v. Davis* (1962), 371 U.S. 178:

> *It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for a decision on the merits to be avoided on the basis of such mere technicalities.* The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits . . . (Emphasis added)

CONCLUSION

Petitioners respectfully pray that the Writ of Certiorari be granted.

Respectfully submitted,

ROBERT C. PAXTON II
(Counsel of Record)
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614/221-3006
Attorney for Petitioners

Dated: Columbus, Ohio October 10, 1986

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM
To wit: May 14, 1986
Case No. 85-1890

John and Macy Trent,
Appellants,

v.

Codman and Shurtleff, Inc., et al.,
Appellees.

REHEARING ENTRY

(Franklin County)

It is ordered by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ Frank D. Celebrezze
Frank D. Celebrezze
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 14th day of May, 1986.

James Wm. Kelly Clerk
/s/ Daniel J. Crowley Deputy

SUPREME COURT OF THE UNITED STATES

No. A-56

JOHN TRENT, ET AL.,
Petitioners,

v.

CODMAN AND SHURTLEFF, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 11, 1986

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 25 day of July, 1986

(Filed November 13, 1981)

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

CASE NUMBER 81CV-11-6201

JOHN TRENT, 2395 CARLFORD STREET,
COLUMBUS, OHIO 43227,
and
MACY J. TRENT, 2395 CARLFORD STREET,
COLUMBUS, OHIO 43227,
Plaintiffs,

vs.

CODMAN AND SHURTLEFF, INC., PACELLA
DRIVE, RANDOLPH, MASS. 02368,
and
JOHNSON AND JOHNSON, PACELLA DRIVE,
RANDOLPH, MASS. 02368,
and
ST. ANTHONY'S HOSPITAL, 1450 HAWTHORNE
AVENUE, COLUMBUS, OHIO 43203,
and
JOHN DOE (NAME UNKNOWN),
Defendants.

COMPLAINT WITH JURY DEMAND ENDORSED THEREON

COMPLAINT

COUNT I

1. On or about January 27, 1978, John Trent underwent a right total hip replacement arthroplasty at St. Anthony's Hospital, being discharged on February 9, 1978.

2. The operation referred to above was performed by Dr. Joseph Schlonsky of Columbus, Ohio.

3. Plaintiff, John Trent, experienced great pain and anguish as a result of the operation of January 27, 1978, was required to convalesce for numerous months after the same and ultimately was again able to ambulate.

4. On or about December 4, 1979, Plaintiff, John Trent, underwent a left total hip replacement arthroplasty with Dr. Schlonsky again performing the surgery.

5. During the month of November, 1979, and subsequent to the left hip replacement, Plaintiff, John Trent, experienced soreness in his right hip so severe that he could not walk on it.

6. On or about December 21, 1979, Dr. Schlonsky X-rayed Plaintiff's right hip and found the metal prosthesis to be broken at or about the point where it enters the femur.

7. As a result of the broken prostheis, Plaintiff, John Trent, was required to undergo a second operation for his right hip and did so during the month of February, 1980. Plaintiff, for a second time, experienced great trauma, anxiety and pain relating to the second operation on his right hip, all of which would not have occurred except for the fact that the prosthesis implanted by Dr. Joseph Schlonsky of Columbus, Ohio severed as noted above.

8. As a result of the second operation on his right hip, Plaintiff developed a severe limp and has been unable to return to his prior occupation as a truck driver.

9. Plaintiff, John Trent, is a fifty-three (53) year old male with a life expectancy of eighty-three (83) years

of age and, as a result of the prosthesis break, the second operation and the resulting permanent injury, will incur a wage loss of $500,000.00.

10. Plaintiff incurred a hospital and doctor bill as a result of the second operation on his right hip in the approximate sum of $13,000.00.

11. As a direct and proximate cause of the prosthesis break, Plaintiff was unemployed for many months, suffered great pain and anguish all to his damage in the sum of $600,000.00.

12. Except for the fact that the prosthesis became severed at or about the femur, Plaintiff, John Trent, would not have suffered and incurred the damages above.

COUNT II

13. Plaintiff, John Trent, hereby incorporates paragraphs 1-12 of the foregoing Count as if fully rewritten and set out herein.

14. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson of Randolph, Mass. are the manufacturers of the prosthesis implanted in Plaintiff's right hip or femur by Dr. Joseph Schlonsky.

15. Defendants negligently manufactured, sold and prepared for sale or resale the prosthesis implanted into Plaintiff's femur, which prosthesis was defective, ultimately breaking and causing the damage to the Plaintiff, John Trent, as set forth herein.

16. Except for the negligence of Defendants Codman and Shurtleff, Inc. and Johnson and Johnson in the manufacture of this defective prosthesis, Plaintiff would not have sustained damages.

COUNT III

17. Plaintiff, John Trent, hereby incorporates paragraphs 1-16 of the foregoing Counts as if fully rewritten and set out herein.

18. Defendants Codman and Shurtleff, Inc. and Johnson and Johnson knew the specific purpose for which the prosthesis it manufactured was to be used, that it would be required to carry considerable weight and would ultimately be placed in the human body as a hip substitute.

19. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson, negligently designed the prosthesis in question knowing it would break when implanted, or should have known the same.

20. Codman and Shurtleff, Inc. and Johnson and Johnson, Defendants, could have manufactured a stronger prosthesis, incorporating different metals or alloys that would have precluded it from breaking or severing as in the case of the Plaintiff.

21. The negligence in the manufacture of a defective product or in the alternative, the negligence of Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson in the design of this prosthesis was the direct and proximate cause of Plaintiff's injuries.

COUNT IV

22. Plaintiff, John Trent, hereby incorporates paragraphs 1-21 of the foregoing Counts as if fully rewritten and set out herein.

23. Plaintiff, John Trent, is an individual with a small frame and body and, on or about the date of the prosthesis break, weighed approximately 135 pounds.

24. Throughout the course of Plaintiff's normal functions such as walking, sitting and standing, the prosthesis was being used in a manner or mode reasonably anticipated by Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson and this allegation applies as well in Counts II and III above.

25. In selling the prosthesis in question, Defendants Codman and Shurtleff, Inc. and Johnson and Johnson impliedly warranted to the Plaintiff that it was of a quality which would at least pass without objection in the trade, was at least fit for the ordinary purpose for which it was sold and to be used, and was, in all other respects, of merchantable quality.

26. Plaintiff purchased the prosthesis in question, relying on the implied warranty of merchantability.

27. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson breached the warranty in that the prosthesis sold to the Plaintiff was unmerchantable and unfit to be used as a prosthesis for which the Plaintiff purchased it.

28. The condition of the prosthesis was unknown to the Plaintiff, and not discoverable by the Plaintiff in the exercise of ordinary care.

29. As a direct result of Defendants' breach of implied warranty of mechantability, Plaintiff has been damaged as set forth above.

COUNT V

30. Plaintiff, John Trent, hereby incorporates paragraphs 1-29 of the foregoing Counts as if fully set out and rewritten herein.

31. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson manufactured the prosthesis in question

for a specific purpose, that is, to be implanted in the human body as a hip replacement.

32. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson impliedly warranted that the prosthesis would be fit for the particular purpose for which it was manufactured, and was, in all other respects, of merchantable quality.

33. The prosthesis in question was not fit for the purpose for which it was manufactured and was otherwise defective as set forth above.

34. Defendants breached the implied warranty of merchantability for a particular purpose and as a direct result thereof, Plaintiff has been damaged as set out herein.

COUNT VI

35. Plaintiff, John Trent, hereby incorporates paragraphs 1-34 of the foregoing Counts as if fully set out and rewritten herein.

36. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson expressly represented and warranted to Plaintiff, by advertisements directed to the attention of the public in particular to the ultimate consumer, that such consumers, including the Plaintiff, could use the prosthesis in question for the purposes intended and in the manner directed by Defendants, and in complete safety.

37. In purchasing the prosthesis in question, the Plaintiff relied on the skill and judgment of Codman and Shurtleff, Inc. and Johnson and Johnson, the Defendants, and on their expressed warranty as set forth in the preceding paragraph.

38. At the time of the purchase of the prosthesis by Plaintiff, and at the time it was sold by Defendants,

Codman and Shurtleff, Inc. and Johnson and Johnson for resale, the warranty was untrue and the prosthesis was not reasonably suitable and fit for use by Plaintiff in that it was improperly manufactured, improperly designed or negligently designed.

39. As a direct result of the breach of warranty by the Defendants, and after the Plaintiff had used the prosthesis in a proper manner and as directed by Defendants, the prosthesis broke, causing Plaintiff to undergo a second operation for his right hip and thus causing the damages set out above.

COUNT VII

40. Plaintiff, John Trent, hereby incorporates paragraphs 1-39 of the foregoing Counts as if fully rewritten and set out herein.

41. At the time of the manufacture of the prosthesis in question and at all times prior to the time the same was placed in Plaintiff's femur, the same was under the exclusive supervision and control of Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson and if Defendants had manufactured the prosthesis with reasonable care, instead of in a negligent manner, then in the ordinary course, the prosthesis would not have broken or severed, causing the damages to the Plaintiff as herein alleged.

42. Plaintiffs' injuries were directly and proximately caused by the negligence of the Defendants in the manufacture, design and distribution of the prosthesis in question and failed to take adequate steps to protect the public, and this Plaintiff particularly, from the danger which could have been reasonably anticipated from the intended use of the prosthesis.

COUNT VIII

43. Plaintiff, John Trent, hereby incorporates paragraphs 1-42 of the foregoing Counts as if fully rewritten and set out herein.

44. Defendant, St. Anthony's Hospital, was engaged in selling the prosthesis in question to the public and this Plaintiff.

45. In selling the prosthesis, Defendant, St. Anthony's Hospital, warranted that it was merchantable and reasonably fit and suitable for the purpose for its intended use, that is, as and for replacement of a right hip.

46. Plaintiff relied on the warranty by Defendant, St. Anthony's Hospital, arising from such sale in making the purchase.

47. At the time of the sale by Defendant, St. Anthony's Hospital, the prosthesis was not merchantable and was not reasonably fit and suitable for its intended use in that it was a defective prosthesis or an improperly designed prosthesis and would break after inserted in Plaintiff's femur and pressure applied.

48. As a result of the breach of warranty by Defendant, St. Anthony's Hospital, Plaintiff suffered those injuries set forth above.

COUNT IX

49. Plaintiff, John Trent, hereby incorporates paragraphs 1-48 of the foregoing Counts as if fully rewritten and set out herein.

50. Defendant, St. Anthony's Hospital, knew that the product, the prosthesis in question, would be used without inspection for defect and by placing it on the market,

represented that it would safely perform the function for which it was intended and that it was of merchantable quality and reasonably fit for its intended use.

51. The prosthesis was unsafe, not fit for its intended use, and not of merchantable quality by reason of the fact that it was defectively manufactured and improperly designed.

52. Plaintiff was unaware of the defect in the prosthesis which made it unsafe, not fit for its intended use, and not of merchantable quality.

53. As a direct and proximate result of Defendant, St. Anthony's Hospital's breach of this warranty, the Plaintiff, John Trent, suffered the damages alleged above.

COUNT X

54. Plaintiff, John Trent, hereby incorporates paragraphs 1-53 of the foregoing Counts as if fully rewritten and set out herein.

55. Defendant(s), John Doe, were the distributors, manufacturers and designers of the prosthesis above and would have ultimate liability to Plaintiff, John Trent.

56. Defendant(s), John Doe, negligently manufactured the prosthesis in question.

57. Defendant(s), John Doe, negligently designed the prosthesis in question.

58. Defendant(s), John Doe, impliedly warranted the prosthesis in question as alleged in this Complaint, giving rise to plaintiff's damages.

59. Defendant(s), John Doe, impliedly warranted that the prosthesis was fit for a particular purpose as alleged above.

60. Defendant(s), John Doe, expressly warranted the prosthesis in question as alleged above.

61. Defendant(s), John Doe, put a dangerous product on the market, knew it was defective, was sold within their control, and the product, the prosthesis, broke, all as alleged above.

62. As a direct and proximate cause of the allegations set forth in this Count and those Counts incorporated herein by reference, Defendant(s), John Doe, directly and proximately caused the damages to the Plaintiff as set forth above.

COUNT XI

63. Plaintiff, John Trent, hereby incorporates paragraphs 1-62 of the foregoing Counts as if fully rewritten and set out herein.

64. Plaintiff, Macy J. Trent, is the wife of John Trent, of approximately thirty (30) years, and the mother of five (5) children.

65. Plaintiff, Macy J. Trent, states that as a result of her relationship with Plaintiff, John Trent, that she is entitled to the services and affections of her husband.

66. Plaintiff, Macy J. Trent, states that as a result of all the allegations heretofore pleaded in each and every Count above, she has been deprived of such services and affection of her husband, John Trent.

67. Plaintiff, Macy Trent, states that she has been damaged in the sum of $100,000.00.

WHEREFORE, the Plaintiff, John Trent, demands Judgment jointly and severally against Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson, and

Defendant, St. Anthony's Hospital, and Defendant(s), John Doe in the sum of $1,200,000.00 as and for Counts I-X, costs and reasonable attorneys fees, all as which will be presented at the trial of this matter.

Plaintiff, Macy J. Trent, demands Judgment against the Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson, Defendant, St. Anthony's Hospital, and Defendant(s), John Doe, jointly and severally in the sum of $100,000.00 as and for the allegations set forth in Counts I-XI, costs, and reasonable attorneys fees as shall be presented at the trial of this matter.

Respectfully submitted,

/s/ Robert C. Paxton II
Robert C. Paxton II (PAX01)
Attorney for Plaintiffs
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Columbus, Ohio 43215
614/221-3006

DEMAND FOR TRIAL BY JURY

Now come the Plaintiffs, demanding that each and every Count of their respective causes of action be tried to a jury of eight (8).

/s/ Robert C. Paxton II
Robert C. Paxton II (PAX01)
Attorney for Plaintiffs

(Filed April 13, 1982)

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Case Number 81CV-11-6201

JOHN TRENT, et al.,
Plaintiffs,

vs.

CODMAN AND SHURTLEFF, INC., et al.,
Defendants.

TENDERED AMENDED COMPLAINT WITH JURY DEMAND ENDORSED THEREON

TENDERED AMENDED COMPLAINT

COUNT I

1. Plaintiffs incorporate paragraphs 1-67 of their original Complaint as if fully set out and rewritten in this Count, the said paragraphs 1-67 being filed with the Court of Common Pleas on November 13, 1981.

COUNT II

2. Plaintiffs hereby incorporate paragraph 1 as if fully set out herein.

3. On or about March 5, 1982 John Trent underwent a left/total hip replacement arthroplasty at Riverside Hospital, the said operation being performed by Dr. John S. Wolfe.

4. Plaintiff, John Trent, experienced great pain and anguish as a result of said operation, was required to convalesce, (and is convalescing) for a number of months, the duration of same unknown at this point.

5. The left hip replacement was necessary due to the failure of the prosthesis, which prosthesis broke in December of 1981.

6. Plaintiff, John Trent, once earlier had his left hip replaced with a prosthesis in December of 1979, said operation being performed by Dr. Joseph Schlonsky.

7. As a result of the prosthesis failure of December, 1979 and the resulting replacement of said prosthesis, John Trent experienced great trauma, anxiety and pain relating to the second operation of his left hip, all of which would not have occurred except for the fact that the prosthesis implanted by Dr. Joseph Schlonsky of Columbus, Ohio in December of 1979 completely severed or otherwise failed.

8. As a result of the second operation on Plaintiff's left hip, Plaintiff developed, and will develop, a severe limp, and is unable to return to his occupation.

9. Plaintiff, John Trent, is 53 years of age, with a life expectancy of 83 years of age and, as a result of the prosthesis break, the second operation and permanent injury will incur a wage loss of an additional $500,000.00.

10. Plaintiff incurred a new hospital bill at Riverside Hospital as a result of the second operation required on his left hip in the approximate sum of $15,000.00.

11. As a direct and proximate cause of the prosthesis break on Plaintiff's left hip, Plaintiff cannot gain employment, has suffered great pain and anguish all to his additional damage and detriment in the sum of $600,000.00.

12. Except for the fact that the prosthesis became severed at or about the femur, Plaintiff, John Trent, would not have suffered and incurred the damages above.

COUNT II

13. Plaintiff, John Trent, hereby incorporates paragraphs 1-12 of the foregoing Count as if fully rewritten and set out herein.

14. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson of Randolph, Mass. are the manufacturers of the prosthesis implanted in Plaintiff's right hip or femur by Dr. Joseph Schlonsky.

15. Defendants negligently manufactured, sold and prepared for sale or resale the prosthesis implanted into Plaintiff's femur, which prosthesis was defectively, ultimately breaking and causing the damage to the Plaintiff, John Trent, as set forth herein.

16. Except for the negligence of Defendants Codman and Shurtleff, Inc. and Johnson and Johnson in the manufacture of this defective prosthesis, Plaintiff would not have sustained damages.

COUNT III

17. Plaintiff, John Trent, hereby incorporates paragraphs 1-16 of the foregoing Counts as if fully rewritten and set out herein.

18. Defendants Codman and Shurtleff, Inc. and Johnson and Johnson knew the specific purpose for which the prosthesis it manufactured was to be used, that it would be required to carry considerable weight and would ultimately be placed in the human body as a hip substitute.

19. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson, negligently designed the prosthesis in question knowing it would break when implanted, or should have known the same.

20. Codman and Shurtleff, Inc. and Johnson and Johnson, Defendants, could have manufactured a stronger prosthesis incorporating different metals or alloys that would have precluded it from breaking or severing as in the case of the Plaintiff.

21. The negligence in the manufacture of a defective product or in the alternative, the negligence of Defendants, Codman and Shurtleff, Inc., and Johnson and Johnson in the design of this prosthesis was the direct and proximate cause of Plaintiff's injuries.

COUNT IV

22. Plaintiff, John Trent, hereby incorporates paragraphs 1-21 of the foregoing Counts as if fully rewritten and set out herein.

23. Plaintiff, John Trent, is an individual with a small frame and body and, on or about the date of the prosthesis break, weighed approximately 135 pounds.

24. Throughout the course of Plaintiff's normal functions such as walking, sitting and standing, the prosthesis was being used in a manner or mode reasonably anticipated by Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson, and this allegation applies as well in Counts II and III above.

25. In selling the prosthesis in question, Defendants Codman and Shurtleff, Inc. and Johnson and Johnson impliedly warranted to the Plaintiff that it was of a quality

which would at least pass without objection in the trade, was at least fit for the ordinary purpose for which it was sold and to be used, and was, in all other respects, of merchantable quality.

26. Plaintiff purchased the prosthesis in question, relying on the implied warranty of merchantability.

27. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson breached the warranty in that the prosthesis sold to the Plaintiff was unmerchantable and unfit to be used as a prosthesis for which the Plaintiff purchased it.

28. The condition of the prosthesis was unknown to the Plaintiff, and not discoverable by the Plaintiff in the exercise of ordinary care.

29. As a direct result of Defendants' breach of implied warranty of merchantability, Plaintiff has been damaged as set forth above.

COUNT V

30. Plaintiff, John Trent, hereby incorporates paragraphs 1-29 of the foregoing Counts as if fully set out and rewritten herein.

31. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson manufactured the prosthesis in question for a specific purpose, that is, to be implanted in the human body as a hip replacement.

32. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson impliedly warranted that the prosthesis would be fit for the particular purpose for which it was manufactured and was otherwise defective as set forth above.

34. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson breached the implied warranty of merchantability for a particular purpose and as a direct result thereof, Plaintiff has been damaged as set out herein.

COUNT VI

35. Plaintiff, John Trent, hereby incorporates paragraphs 1-34 of the foregoing Counts as if fully set out and rewritten herein.

36. Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson expressly represented and warranted to Plaintiff, by advertisements directed to the attention of the public in particular to the ultimate consumer, that such consumers, including the Plaintiff, could use the prosthesis in question for the purposes intended and in the manner directed by Defendants, and in complete safety.

37. In purchasing the prosthesis in question, the Plaintiff relied on the skill and judgment of Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson, and on their expressed warranty as set forth in the preceding paragraph.

38. At the time of the purchase of the prosthesis by Plaintiff, and at the time it was sold by Defendants, Codman and Shurtleff Inc. and Johnson and Johnson, for resale, the warranty was untrue and the prosthesis was not reasonably suitable and fit for use by Plaintiff in that it was improperly manufactured, improperly designed or negligently designed.

39. As a direct result of the breach of warranty by the Defendants, and after the Plaintiff had used the prosthesis in a proper manner and as directed by Defendants, the prosthesis broke, causing Plaintiff to undergo a sec-

ond operation for his right hip and thus causing the damages set out above.

COUNT VII

40. Plaintiff, John Trent, hereby incorporates paragraphs 1-39 of the foregoing Counts as if fully rewritten and set out herein.

41. At the time of the manufacture of the prosthesis in question and at all times prior to the time the same was placed in Plaintiff's femur, the same was under the exclusive supervision and control of Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson, and if Defendants had manufactured the prosthesis with reasonable care, instead of in a negligent manner, then in the ordinary course, the prosthesis would not have broken or severed, causing the damages to the Plaintiff as herein alleged.

42. Plaintiffs' injuries were directly and proximately caused by the negligence of the Defendants in the manufacture, design and distribution of the prosthesis in question and failed to take adequate steps to protect the public, and this Plaintiff particularly, from the danger which could have been reasonably anticipated from the intended use of the prosthesis.

COUNT VIII

43. Plaintiff, John Trent, hereby incorporates paragraphs 1-42 of the foregoing Counts as if fully rewritten and set out herein.

44. Defendant, St. Anthony's Hospital, was engaged in selling the prosthesis in question to the public and this Plaintiff.

45. In selling the prosthesis, Defendant, St. Anthony's Hospital, warranted that it was merchantable and reasonably fit and suitable for the purpose of its intended use, that is, as and for replacement of a right hip.

46. Plaintiff relied on the warranty by Defendant, St. Anthony's Hospital, arising from such sale in making the purchase.

47. At the time of the sale by Defendant, St. Anthony's Hospital, the prosthesis was not merchantable and was not reasonably fit and suitable for its intended use in that it was a defective prosthesis or an improperly designed prosthesis and would break after inserted in Plaintiff's femur and pressure applied.

48. As a result of the breach of warranty by Defendant, St. Anthony's Hospital, Plaintiff suffered those injuries set forth above.

COUNT IX

49. Plaintiff, John Trent, hereby incorporates paragraphs 1-48 of the foregoing Counts as if fully rewritten and set out herein.

50. Defendant, St. Anthony's Hospital, knew that the product, the prosthesis in question, would be used without inspection for defect and by placing it on the market, represented that it would safely perform the function for which it was intended and that it was of merchantable quality and reasonably fit for its intended use.

51. The prosthesis was unsafe, not fit for its intended use, and not of merchantable quality by reason of the fact that it was defectively manufactured and improperly designed.

52. Plaintiff was unaware of the defect in the prosthesis which made it unsafe, not fit for its intended use, and not of merchantable quality.

53. As a direct and proximate result of Defendant, St. Anthony's Hospital's breach of this warranty, the Plaintiff, John Trent, suffered the damages alleged above.

COUNT X

54. Plaintiff, John Trent, hereby incorporates paragraphs 1-53 of the foregoing Counts as if fully rewritten and set out herein.

55. Defendant(s), John Doe, were the distributors, manufacturers and designers of the prosthesis above and would have ultimate liability to Plaintiff, John Trent.

56. Defendant(s), John Doe, negligently designed the prosthesis in question.

57. Defendant(s), John Doe, negligently manufactured the prosthesis in question.

58. Defendant(s), John Doe, impliedly warranted the prosthesis in question as alleged in this Complaint, giving rise to Plaintiff's damages.

59. Defendant(s), John Doe, impliedly warranted that the prosthesis was fit for a particular purpose as alleged above.

60. Defendant(s), John Doe, put a dangerous product on the market, knew it was defective, was sold within their control, and the product, the prosthesis, broke, all as alleged above.

61. Defendant(s), John Doe, expressly warranted the prosthesis in question as alleged above.

62. As a direct and proximate cause of the allegations set forth in this Count and those Counts incorporated herein by reference, Defendant(s), John Doe, directly and proximately caused the damages to the Plaintiff as set forth above.

COUNT XI

63. Plaintiff, John Trent, hereby incorporates paragraphs 1-62 of the foregoing Counts as if fully rewritten and set out herein.

64. Plaintiff, Macy J. Trent, is the wife of John Trent, of approximately thirty (30) years, and the mother of five (5) children.

65. Plaintiff, Macy J. Trent, states that as a result of her relationship with the Plaintiff, John Trent, that she is entitled to the services and affections of her husband.

66. Plaintiff, Macy J. Trent, states that as a result of all the allegations heretofore pleaded in each and every Count above, she has been deprived of such services and affection of her husband, John Trent.

67. Plaintiff, Macy J. Trent, states that she has been damaged in the sum of $200,000.00.

WHEREFORE, the Plaintiff, John Trent, demands Judgment jointly and severally against Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson, and Defendant, St. Anthony's Hospital, and Defendant(s) John Doe in the sum of $2,400,000.00 as and for Counts I-X, costs and reasonable attorneys fees, all as which will be presented at the trial of this matter.

Plaintiff, Macy J. Trent, demands Judgment against the Defendants, Codman and Shurtleff, Inc. and Johnson

and Johnson, Defendant, St. Anthony's Hospital, and Defendant(s), John Doe, jointly and severally in the sum of $100,000.00 as and for the allegations set forth in Counts I-XI, costs, and reasonable attorneys fees as shall be presented at the trial of this matter.

Respectfully submitted,

/s/ Robert C. Paxton II
Robert C. Paxton II (PAX01)
Attorney for Plaintiffs
88 E. Broad Street #1220
Columbus, Ohio 43215
614/221-3006

JURY DEMAND

Plaintiffs hereby request that a jury of eight (8) of their peers be impanelled to hear their case.

/s/ Robert C. Paxton II
Robert C. Paxton II
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by regular United States mail to George F. Gore, Esq., 1144 United Commerce Building, Cleveland, Ohio 44115 and to Michael J. Renner, Esq., 100 East Broad Street, Columbus, Ohio 43215 on this 14th day of April, 1982.

/s/ Robert C. Paxton II
Robert C. Paxton II
Attorney for Plaintiffs

(Filed October 6, 1982)

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Case No. 81CV-11-6201
JUDGE FAIS

JOHN TRENT, et al.,
Plaintiffs,

v.

DR. JOSEPH SCHLONSKY 5975 EAST BROAD STREET
COLUMBUS, OHIO 43213, et al.,
Defendants.

THIRD AMENDED COMPLAINT

COUNT I

1. Plaintiffs hereby incorporate Paragraphs 1-67 of their original Complaint as if fully set out and rewritten herein.

2. Said Paragraphs 1-67 of the original Complaint were filed with the Court of Common Pleas on November 13, 1981.

COUNT II

3. Plaintiffs hereby incorporate Paragraphs 1-67 of their Tendered Amended Complaint as if fully set out and rewritten herein.

4. Said Paragraphs 1-67 were filed with the Court of Common Pleas on April 13, 1982.

COUNT III

5. Plaintiffs hereby incorporate Paragraphs 1-21 of their Tendered Amended Complaint as if fully set out and rewritten herein.

6. Said Paragraphs 1-21 were filed with the Court of Common Pleas on or about the 16th day of June, 1982.

COUNT IV

7. Plaintiffs hereby incorporate Paragraphs 1-6 as if fully set out and rewritten herein.

8. On or about January 27, 1978 John Trent underwent a right total hip replacement arthroplasty at St. Anthony's Hospital, being discharged February 9, 1978.

9. The operation referred to above was performed by Doctor Joseph Schlonsky of Columbus, Ohio.

10. Plaintiff John Trent experienced great pain and anguish as a result of the operation of January 27, 1978, was required to convalesce for numerous months after the same, and ultimately was again able to ambulate.

11. On or about December 4, 1979 Plaintiff John Trent underwent a total left hip replacement arthroplasty with Dr. Schlonsky again performing the surgery.

12. During the month of November 1979 and subsequent to left hip replacement, Plaintiff, John Trent experienced a soreness of his right hip so severe that he could not walk.

13. On or about December 21, 1979 Dr. Schlonsky X-rayed Plaintiff's right hip and found the metal prosthesis to be broken at or about the point where it entered the femur.

14. As a result of the broken prosthesis Plaintiff, John Trent was required to undergo a second operation for his right hip and did so during the month of February, 1980.

15. Plaintiff for a second time experienced great trauma, anxiety, and pain relating to the second operation on his right hip.

16. As a result of the second operation on his right hip, Plaintiff developed a severe limp and has been unable to return to his prior occupation as a truck driver.

17. Plaintiff John Trent is a 53 year old male, with a life expectancy of 83 years of age, and as a result of the prosthesis break, the second operation, and the resulting permanent injury, will incur wage loss of $500,000.00.

18. Plaintiff John Trent incurred a hospital and doctor bill as a result of the second operation on his right hip in the approximate sum of $13,000.00.

19. As a direct and approximate cause of the prosthesis break, the Plaintiff was unemployed for many months, suffered great pain and anguish all to his damage in the sum of $600,000.00.

20. Except for the fact that the prosthesis broke at or about the femur, Plaintiff John Trent would not have suffered and incurred the damages above.

21. Defendant, Dr. Joseph Schlonsky negligently prepared, or caused to be prepared, handled, inserted, and/or monitored the prosthesis implanted into Plaintiff John Trent.

22. Defendant, Joseph Schlonsky's negligent actions were the direct and approximate cause of the breaking of the prosthesis after implantation in the Plaintiff's femur.

22. But for the negligence of the Defendant, Dr. Joseph Schlonsky, Plaintiff John Trent would not have sustained the above out-lined damages.

WHEREFORE, the Plaintiffs demand judgment against Defendant Dr. Joseph Schlonsky in the sum of $125,000.00, as for Count IV in the Third Amended Complaint, costs and reasonable attorney fees, all as which will be presented at the trial of this matter.

Respectfully submitted,

Robert C. Paxton II & Associates
/s/ Robert C. Paxton II
Robert C. Paxton II
88 East Broad Street Suite 1590
Columbus, Ohio 43215
614/221-3006
/s/ Douglas B. Dougherty
Douglas B. Dougherty

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. mail to George F. Gore, Esq. 1144 United Commerce Building, Cleveland, Ohio 44115, and To Michael J. Renner, Esq. 100 East Broad Street, Columbus, Ohio 43215 on this 1 day of Oct, 1982.

/s/ Robert C. Paxton II

ADDITIONAL CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by certified U.S. mail to Dr. Joseph Schlonsky, 5975 East Broad Street, Columbus, Ohio 43213, on this 4 day of Oct, 1982.

/s/ Robert C. Paxton II (DBD)
Robert C. Paxton II

(Filed November 30, 1984)

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Case No. 81CV-11-6201
JUDGE FAIS

JOHN TRENT, *et al.*,
Plaintiffs,

vs.

CODMAN AND SHURTLEFF, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

I. Upon Motion of Defendant, Joseph Schlonsky, M.D. for partial summary judgment and briefing by all parties, and reconsideration thereof, the Court finds a portion of said Motion to be well taken and GRANTS said Motion to the following extent:

A. As to the consortium claim filed by Plaintiff Macy Trent based upon injuries to her husband arising from surgery performed upon his right hip on January 27, 1978, said action was brought against Defendant Schlonsky beyond the running of the appropriate statute of limitations. SUMMARY JUDGMENT is hereby ENTERED against Plaintiff Macy Trent and in favor of Defendant Schlonsky on Plaintiff's consortium claim arising from injuries suffered by John Trent related to and resulting from the right hip surgery of January 27, 1978.

B. As to the claim brought by Plaintiff Johnson Trent against Defendant Schlonsky relating to allegedly negligent surgery performed on December 6, 1979, to his left hip, the Court finds that Plaintiff discovered the resulting injury no later than December 29, 1981. Plaintiff did not sue Defendant Schlonsky regarding said surgery until more than one year thereafter and, therefore, said suit is time barred. JUDGMENT is ENTERED against Plaintiff Johnson Trent and in favor of Defendant Schlonsky as to said Plaintiff's claim for relief for damages relating to and arising from the left hip surgery of December 6, 1979.

C. As to the claims brought by Plaintiff Johnson Trent against Defendant Schlonsky relating to allegedly negligent surgery performed on January 27, 1978, to his right hip, the Court likewise finds that the resulting injury was discovered more than one year prior to the filing of this claim. However, Plaintiff alleges that Defendant Schlonsky should be estopped from asserting the statute of limitations as a defense to Plaintiffs' claims relating to the surgery performed on January 27, 1978, to his right hip. The Court finds factual issues exist as to estoppel and the Court, therefore, DENIES Defendant's Motion for Summary Judgment as to injuries suffered by Plaintiff, Johnson Trent, resulting from the right hip surgery of January 27 1978. The Court does not hereby hold that said claim was timely brought, it holds only that the statute of limitations questions cannot be resolved until factual determinations are made upon Plaintiffs' claim of estoppel.

Defendant's contention that there exists an absolute four year statute of limitations, with respect to

the January 27, 1978 surgery upon Plaintiff's right hip, is not correct in light of the case of *Oliver v. Kaiser Community Health Foundation* (1983), 5 Ohio St.3d 111.

II. Upon Motion of Defendants, Codman and Shurtleff, Inc. and Johnson and Johnson, Inc. for Summary Judgment, the Court finds genuine issues of material fact exist and therefore, DENIES these Defendants' Motion for Summary Judgment.

III. The Court incorporates herein its decision rendered August 31, 1982, and holds that Defendant St. Anthony's Hospital's Motion for Partial Summary Judgment is DENIED.

IV. The Court hereby enters final judgment and expressly determines that here is no just cause for delay as to the above matters.

.....

Judge Fais

APPROVED:

Robert C. Paxton II (PAX01)
Robert C. Paxton II & Associates
88 East Broad Street Suite 1590
Columbus, Ohio 43215
614/221-3006
Attorney for Plaintiffs

Richard Dean
Arter & Hadden
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Attorney for Defendants,
Codman and Shurtleff, Inc.
and Johnson and Johnson, Inc.

Michael J. Renner (REN01)
Bricker & Eckler
100 East Broad Street
Columbus, Ohio 43215
614/227-2300
Attorney for Defendant,
Joseph Schlonsky, M.D.
and St. Anthony's Hospital

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 84AP-1078
(REGULAR CALENDAR)

John Trent and Macy J. Trent,
Plaintiffs-Appellants,

v.

Codman and Shurtleff, Inc., Johnson & Johnson,
and Dr. Joseph Schlonsky,
Defendants-Appellees,
(Cross-Appellants),
St. Anthony's Hospital,
Defendant-Appellee.

OPINION
Rendered on October 10, 1985

ROBERT C. PAXTON II & ASSOCIATES, MR. ROBERT C. PAXTON, II, and MS. PATRICIA A. JAMISON, for appellants.

MESSRS. ARTER & HADDEN, and MR. RICHARD A. DEAN; MESSRS. KNEPPER, WHITE, ARTER & HADDEN, and MR. CHARLES R. JANES, for appellees/cross-appellants Codman and Shurtleff, Inc., and Johnson & Johnson, Inc.

MESSRS. BRICKER & ECKLER, and MR. MICHAEL J. RENNER, for appellee/cross-appellant Dr. Joseph Schlonsky and appellee St. Anthony's Hospital.

APPEAL from the Franklin County Court of Common Pleas.

REILLY, P.J.

This is an appeal from the partial grant of summary judgment by the Court of Common Pleas, Franklin County, Ohio.

This action is based on the following facts. John Trent underwent a right total hip arthroplasty in January 1978, performed by Dr. Joseph Schlonsky at St. Anthony's Hospital during which a prosthesis was implanted. On December 3, 1979, John Trent underwent a left total hip arthroplasty again performed by Dr. Schlonsky. The right hip prosthesis broke in January 1980 requiring a second operation to replace the broken device. Then appellants brought an action against Codman and Shurtleff, Inc., and Johnson & Johnson, Inc., manufacturers and distributors of the prosthesis, and St. Anthony's Hospital, as seller of the prosthesis. This action alleged negligent design, negligent manufacture and breach of warranties. This original complaint was filed in November 1981.

Approximately one month later, on December 24, 1981, the left hip prosthesis broke, again requiring a second operation. The original complaint was then amended to allege the left prosthesis break and consequent damages. This amended complaint was filed on April 13, 1982. Following depositions and further investigation, the complaint was further amended and filed on October 6, 1982, naming for the first time appellee Dr. Joseph Schlonsky as a defendant. On February 16, 1983, the fourth amended complaint was filed alleging Dr. Schlonsky's negligence as to the right hip and left hip arthroplasty surgeries.

Following motions by all the appellees, a partial summary judgment was granted on November 30, 1984, in favor of appellee Dr. Schlonsky. The trial court held that two of the claims asserted by the appellants were barred by the statute of limitations. The two barred claims were the consortium claim of Macy Trent for the right hip injuries and the malpractice claim of John Trent for the left hip injuries against Dr. Schlonsky. The court denied the motions for summary judgment of appellees, Codman and Schurtleff, Inc., and Johnson & Johnson, Inc.

Appellants, John and Macy Trent, appeal this judgment. Cross-appellants, Dr. Schlonsky, Codman and Shurtleff, Inc., and Johnson & Johnson, Inc., appeal the denial of summary judgment on all the claims.

Appellants advance the following assignments of error, as follows:

"I. Plaintiff-Appellant's, Mr. Trent's, left hip claim:

"A. The trial court erred in ruling that Plaintiff-Appellant's, Mr. Trent's, claim for negligent treatment of his left hip was time-barred, and in entering summary judgment against him on this claim.

"B. The trial court erred in ruling, by implication, that the Third Amended Complaint was insufficient to state a cause of action for negligent treatment of the left hip.

"C. The trial court erred in ruling that the left hip allegations contained in the Fourth Amended Complaint did not relate back to the date of the Third Amended Complaint.

"II. Plaintiff-Appellant's, Mrs. Trent's, right hip consortium claim:

"A. The trial court erred in ruling that Plaintiff-Appellant's, Mrs. Trent's, claim for loss of consortium relating to negligent treatment of her husband's right hip, was time-barred, and in entering summary judgment against her on this claim.

"B. The trial court erred in ruling that Mrs. Trent's right hip consortium claim accrued in January, 1978, when the right hip surgery was performed, and in failing to find that her consortium claim accrued in January, 1980, when her loss of consortium commenced.

"C. The trial court erred in failing to rule that issues of fact exist as to whether Defendant Schlonsky should be estopped from asserting the statute of limitations as a defense against Mrs. Trent's right hip consortium claim."

Appellants maintain, in the first assignment of error, that the trial court erred in holding that the statute of limitations bars Mr. Trent's claim for negligent treatment of his left hip. All parties agree with the rule as stated in *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St. 3d 111, syllabus:

"Under R.C. 2305.11(A), a cause of action for medical malpractice accrues and the statute of limitations commences to run when the patient discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury. (*Gillette v. Tucker*, 67 Ohio St. 106; *Bowers v. Santee*, 99 Ohio St. 361; *Amstutz v. King*, 103 Ohio St. 674; *DeLong v. Campbell*, 157 Ohio St. 22 [47 O.O. 27]; *Lundberg v. Bay View Hospital*, 175 Ohio St. 133 [23 O.O.2d 416]; *Wyler v. Tripi*, 25 Ohio St. 2d 164 [54 O.O.2d 283], and all other inconsistent cases, overruled.)"

Therefore, appellants had one year after the left hip prosthesis broke (until December 1982), pursuant to this discovery rule, to bring a malpractice suit against Dr. Schlonsky. The trial court apparently found that the left hip malpractice claim was not sufficiently pleaded within the one year period.

Appellants contend that the third amended complaint stated a cause of action for negligent treatment of the left hip and was timely filed in October 1982. The appellants base this contention on paragraph three of the third amended complaint incorporating by reference the prior tendered amended complaint and paragraph twenty-two of the third amended complaint. The tendered amended complaint stated an action against the manufacturer, distributor, and seller of the prosthesis implanted into Mr. Trent's left hip. The third amended complaint adds Dr. Schlonsky as a defendant in the right hip claim. Paragraph twenty-two specifically reads:

> "22. But for the negligence of the Defendant, Dr. Joseph Schlonsky, Plaintiff John Trent would not have sustained the above out-lined damages."

After reviewing all the complaints included in the record, it is apparent that the alleged negligence of Dr. Schlonsky was not pleaded until the third amended complaint. Moreover, it is clear that the third amended complaint exclusively involves the right hip claim. Appellants' position is that by taking the allegations in the tendered amended complaint dealing with the left hip together with the claim of Dr. Schlonsky's negligence in the third amended complaint, a cause of action against Dr. Schlonsky for the left hip was sufficiently pleaded within the one year period.

The purpose of pleading a cause of action is to notify the defendant of the claim against him. It is not until the fourth amended complaint filed in February 1983 that it becomes clear that appellants are alleging negligence of Dr. Schlonsky regarding the left hip. The claims involving the left hip in the tendered amended complaint are based on negligent design, negligent manufacture and breach of warranties made by the manufacturers, distributors, and the hospital. In the third amended complaint, appellants aver the left hip arthroplasty but fail to mention the left hip prosthesis break. The third amended complaint does not sufficiently allege Dr. Schlonsky's negligence as to the left hip. Thus, Dr. Schlonsky cannot be charged with notice of the left hip malpractice claim by virtue of the incorporation by reference of the tendered amended complaint coupled with paragraph twenty-two of the third amended complaint.

Appellants argue in the alternative, that the fourth amended complaint, filed February 16, 1983, which did sufficiently state an action against Dr. Schlonsky regarding the left hip, should relate back to the date of the third amended complaint pursuant to Civ. R. 15(C). Civ. R. 15(C) provides:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. • • •"

The issue is whether the facts set forth in the original complaint (third amended) gives notice of the claim set forth in the amended complaint (fourth amended). Appellants maintain that the claim against Dr. Schlonsky as to the left hip in the fourth amended complaint should

relate back to the third amended complaint because the left hip surgery was set forth in the third amended complaint. The difficulty with this argument is that the left hip prosthesis break is not set forth in the third amended complaint. It is the prosthesis break which alerted appellants to the possible cause of action and not the original surgery. More significantly, appellee does not receive notice of the left hip malpractice claim by reading the third amended complaint. Finally, the right hip surgery and subsequent prosthesis break is not the same conduct, transaction or occurrence as the left surgery and prosthesis break. Thus, the fourth amended complaint does not relate back to the third amended complaint.

Therefore, appellants' first assignment of error is overruled.

In the second assignment of error, appellants contend that the trial court erred in finding Mrs. Trent's loss of consortium claim against Dr. Schlonsky as to the right hip barred by the applicable statute of limitations. This cause of action is governed by the four year statute of limitations provided by R.C. 2305.09(D). *Holzwart v. Wehman* (1982), 1 Ohio St. 3d 26. Moreover, the consortium claim was sufficiently alleged in the third amended complaint filed in October 1982.

The Supreme Court has ruled that the "termination rule" (an exception to the one year statute of limitations in medical malpractice cases) will not apply to a spouse's loss of consortium claim. In *Amer v. Akron City Hospital* (1946), 47 Ohio St. 2d 85, a husband brought a suit for loss of consortium arising from claimed acts of malpractice in the administration of x-ray therapy to his wife. The last treatment had occurred in March 1963. The resulting condition of radiation necrosis had not manifested until

1972. The husband's suit was brought in 1974. The trial court held that the consortium claim was barred by the four year statute of limitations in R.C. 2305.09(D). The Supreme Court on appeal held that the consortium claim had to be brought within four years of the date the cause of action accrued. This four year period was not subject to the termination rule which allows a malpractice claim to be brought one year after termination of the physician-patient relationship in certain cases.

Subsequently, in *Holzwart, supra,* the Supreme Court explicitly held that a spouse's action for loss of consortium must be commenced within the time described by R.C. 2305.09(D). The court wrote as follows:

> "* * * Earlier this term in *Lombard v. Medical Center* (1982), 69 Ohio St. 2d 471 [23 O.O.3d 410], and *Koler v. St. Joseph Hospital* (1982), 69 Ohio St. 2d 477 [23 O.O.3d 413], this court construed the one-year statute of limitations in R.C. 2305.11(A), as amended by the General Assembly in the Medical Malpractice Act of 1975. In *Lombard,* in the context of two suits brought against non-professional hospital employees, and *Koler,* involving two claims of wrongful death, and as indicated in the various opinions expressed in those cases, a majority of this court found the one-year statute of limitations contained in R.C. 2305.11(A) applies only to actions sounding in malpractice, as defined in the common law.
>
> "For that reason, the present case, involving a claim for loss of consortium, brought more than one year but less than four years after the cause of action thereof accrued, is not barred by the one-year statute of limitations, since the right of action for loss of consortium caused by the malpractice of a physician

is not one for malpractice at common law. See *Corpman v. Boyer* (1960), 171 Ohio St. 233 [12 O.O.2d 368], paragraph one of the syllabus. Rather, this action is governed by the time limitation set forth in R.C. 2305.09(D). *Amer v. Akron City Hospital* (1976), 47 Ohio St. 2d 85 [1 O.O.3d 51]. * * *" *Id.* at 26.

There is merit in appellants' alternative contention regarding the trial court's error in barring Mrs. Trent's consortium claim. The trial court found that John Trent's malpractice claim for the right hip was brought beyond the one year statute of limitations. The court, notwithstanding, held that factual issues existed as to appellants' claim that Dr. Schlonsky should be estopped from asserting the statute of limitations. Thus, the court denied appellee's motion for summary judgment. Appellants maintain that if estoppel or fraudulent concealment prevents appellee from raising the statute of limitations defense for the right hip malpractice claim, these same principles necessarily apply to the consortium claim based on the right hip injury as well.

Although a spouse's consortium claim is not one for malpractice, both causes of action may arise from the same act. Moreover, it would be illogical to hold that the patient may raise the issue of estoppel but the spouse may not. It is important to note that the trial court did not hold that appellee was estopped from raising the statute of limitations defense, but only that factual issues existed which had to be resolved before the statute of limitations could be successfully applied to John Trent's claim. Accordingly, we determine only that these same issues must be resolved as to the consortium claim as well.

Appellants' second assignment of error is overruled in part and sustained in part.

Appellee, Dr. Schlonsky, cross-appeals the denial of summary judgment as to Mr. Trent's right hip claim. Codman and Shurtleff, Inc., and Johnson & Johnson, Inc., also cross-appeal the denial of summary judgment. Appellants (cross-appellees) filed a motion to dismiss the cross-appeals on the grounds that a denial of summary judgment does not constitute a final appealable order and therefore this court lacks jurisdiction to decide the issues raised in the cross-appeals.

Cross-appellants concede that the general rule in Ohio is that an order denying a motion for summary judgment is not ordinarily a final appealable order. *State, ex rel. Overmyer, v. Walinski, Judge* (1966), 8 Ohio St. 2d 23. Further, they concede that although the judgment entry included the language "no just reason for delay," pursuant to Civ. R. 54(B), this in itself does not alter the general rule. *Douthitt v. Garrison* (1981), 3 Ohio App. 3d 254. Cross-appellants maintain, however, that policy reasons underlying Civ. R. 54(B) permit this court to determine all the issues raised by the partial summary judgment. Similarly they argue that this case is distinguishable from *Overmyer, supra,* and *Douthitt, supra,* in that this is an appeal from the *granting* of summary judgment by a non-moving prevailing party.

Cross-appellant Dr. Schlonsky appeals the denial of summary judgment as to Mr. Trent's right hip claim. Although summary judgment was partially granted for Dr. Schlonsky, it was specifically denied as to this claim. Consequently, we find no facts distinguishing this case from *Overmyer* and *Douthitt,* and in accord with the gen-

eral rule, hold that an order denying a motion for summary judgment is not a final appealable order.

Finally, it is recognized that the policy of Civ. R. 54(B) is to avoid piecemeal appeals and prejudice to parties caused by delay of appeal in multiple party or multi-claims actions. Nevertheless, cross-appellants are not unduly prejudiced by dismissing the cross-appeal at this time. Cross-appellants will be able to appeal the trial court's denial of summary judgment if necessary following an adverse final judgment. But at this point there has been no adverse judgment and no adjudication of the issues raised in the appeal. Finally, there does not appear to be any reason that an appeal after final judgment would not be practicable. See *Columbus v. Adams* (1984), 10 Ohio St. 3d 57.

Thus, the general rule applies and this case falls squarely within that rule. The motion to dismiss the cross-appeals is hereby sustained.

For the foregoing reasons, the judgment is affirmed in part and reversed in part. The cause is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part;
judgment reversed in part
and cause remanded.

MOYER and CASTLE, JJ., concur.

CASTLE, J., retired, of the Twelfth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

OHIO REVISED CODE

§ 2305.11 [Time limitations for bringing certain actions; definitions.]

(A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, or a hospital, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, or hospital apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth

birthday in which to file an action for malpractice against a physician or hospital.

(C) A civil action for nonconsensual abortion pursuant to section 2919.12 of the Revised Code must be commenced within one year after the abortion.

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority responsible for the operation of any hospital licensed or registered in the state, including without limitation those which are owned or operated by the state, political subdivisions, any person, corporation, or any combination thereof. Such term further includes any person, corporation, association, board, entity, or authority responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care and treatment to individuals. It does not include any hospital operated by the government of the United States or any branch thereof.

(2) "Physician" means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) "Medical claim" means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person.

(4) "Podiatrist" means all persons who are licensed to practice podiatric medicine and surgery by the state medical board.

HISTORY: GC § 11225; RS § 4983; S&C 949; 51 v 57, § 16; 91 v 299; 120 v 646; 122 v 374; 135 v H 989 (Eff 9-16-74); 136 v H 682 (Eff 7-28-75); 136 v H 1426. Eff 7-1-76.

OHIO RULES OF CIVIL PROCEDURE

RULE 10. Form of pleadings

(C) Adoption by reference; exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part thereof for all purposes.

RULE 12. Defenses and objections—when and how presented—by pleading or motion—motion for judgment on the pleadings

(E) Motion for definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fourteen days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

RULE 15. Amended and supplemental pleadings

(C) Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom

a claim is asserted relates back if the foregoing provisions is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to this state, a municipal corporation or other governmental agency, or the responsible officer of any of the foregoing, subject to service of process under Rule 4 through Rule 4.6, satisfies the requirements of clauses (1) and (2) of the preceding paragraph if the above entities or officers thereof would have been proper defendants upon the original pleading. Such entities or officers thereof or both may be brought into the action as defendants.

No. 86-626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN AND MACY TRENT,
Petitioners,

vs.

CODMAN AND SHURTLEFF, INC., DR. JOSEPH SCHLONSKY, ST. ANTHONY'S HOSPITAL, and JOHNSON AND JOHNSON, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners state that the question on this Petition is:

> Whether Petitioners were denied due process of law under the Fourteenth Amendment to the United States Constitution when their Complaint was dismissed on the technicality that Defendent, Dr. Joseph Schlonsky, was not put on notice of the claims against him even though the original Complaint and three Amended Complaints,consisting of 177 paragraphs, setting forth each operation, were fully incorporated into each Amended Complaint, and filed within the one year statute of limitations period.

Respondent Joseph Schlonsky, M.D. asserts that Appellants' Petition raises the following additional questions:

1. Whether the Petition was brought in a timely fashion subsequent to dispositive entry of the Ohio Supreme Court.

2. Whether the issues in the case involve a substantial federal question.

3. Whether a federal question was ever raised in the state court proceedings and/or whether the state court based any part of its decision upon a determination of a federal question.

4. Whether the decision of the state court is supportable upon an adequate non federal basis.

5. Whether the questions brought to this Court are unsubstantial in character.

PARTIES

While the parties are those listed in the caption, it is asserted that only Respondent Joseph Schlonsky, M.D. has an interest in the issues brought herein and this brief is filed only on behalf of said Respondent.

Respondent Saint Anthony Medical Center (St. Anthony's Hospital), though represented by the same law firm presenting this brief on behalf of Dr. Schlonsky, specifically does not herein appear or offer argument on the basis that the issues contained herein have no applicability to Saint Anthony Medical Center.

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No. 86-626

IN THE

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

Respondent denies that this Court has jurisdiction pursuant to Title 28 U.S.C. 1257 (3) for the reasons explained hereafter.

STATUTES AND RULES

In addition to the Ohio statutes and rules cited in Appellants' Petition, additional Ohio Rules are relevant:

Rule IX, Rules of Practice of the Supreme Court (Ohio)
Section 1. Motion for Rehearing
A motion for rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his memorandum contra.

Rule 26, Rules of Appellate Procedure (Ohio)
. . . The filing of an application for reconsideration does not extend the time for filing a notice of appeal in a court of appeals.

STATEMENT OF FACTS

On January 27, 1978, Defendant-Appellee Dr. Schlonsky performed total hip replacement surgery upon Plaintiffs-Appellants Mr. Trent's right hip.

Almost two years later, on December 6, 1979, Dr. Schlonsky performed total hip replacement surgery on Mr. Trent's left hip. This procedure was an entirely separate operation performed upon Mr. Trent's other hip and was not medically related to the earlier operation upon his right hip.

In January, 1980, the metal prosthesis implanted into Mr. Trent's right hip broke. In December, 1981, the prosthesis implanted into Mr. Trent's left hip also broke.

Although not named as a defendant in the original complaint filed November 13, 1981, Defendent-Appellee Dr. Schlonsky was joined as a defendant by Plaintiffs-Appellants, by their Third Amended Complaint, filed October 6, 1982.

STATEMENT OF THE CASE

On November 13, 1981, Plaintiffs-Appellants, Mr. and Mrs. John Trent, filed a Complaint in the Court of Common Pleas of Franklin County, Ohio, based upon two separate surgical procedures performed on Mr. Trent: a right total hip replacement arthroplasty performed on January 27, 1978, and a left total hip replacement arthroplasty performed on December 6, 1979. The Complaint was filed against the prosthesis distributor, Codman and Shurtleff and against the hospital, St. Anthony Medical Center.

Although not named a defendant in the original Complaint, Defendant-Appellee Dr. Schlonsky was joined as a defendant by Plaintiffs-Appellants by their Third Amended Complaint, filed October 6, 1982. The previous three complaints, contained no inference of surgeon negligence.

The Third Amended Complaint asserted that Dr. Schlonsky had been negligent in the manner that he surgically replaced the patient's right hip. No allegation was made in said Amended Complaint that Dr. Schlonsky was negligent in any fashion regarding the prosthesis implant in Mr. Trent's left hip. An allegation of surgeon negligence regarding the surgery on Mr. Trent's left hip was first made in Plaintiff-Appellants' Fourth Amended Complaint filed on February 9, 1983. Plaintiffs-Appellants went on to file two more amended complaints, but the issues raised therein are not a part of this appeal.

On August 10, 1983, Defendant-Appellee Schlonsky moved for summary judgment as to the malpractice claims of Mr. Trent asserted for both the right hip surgery and the subsequent left hip surgery, and as to one of the two consortium claims of Mrs. Trent. Dr. Schlonsky asserted that the malpractice claims were barred by the one-year statute of limitations accruing upon discovery of the injury, and that part of the malpractice claims were barred by the

four-year absolute termination provision of § 2305.11 (B) Ohio Revised Code. Defendant-Appellee further asserted that the relevant consortium claim was filed beyond the four-year statute of limitations applicable thereto.

By Judgment Entry of November 30, 1984, the trial court granted Defendant-Appellee Dr. Schlonsky's motion, finding that the consortium claim of Mrs. Trent at issue was time-barred, and finding further that both of Mr. Trent's malpractice claims were filed more than one year after the discovery of the injury. However, the trial court found that as to Mr. Trent's malpractice claim based on the right hip surgery, a factual question remained regarding the tolling of the statute of limitations on the grounds of fraudulent concealment and/or estoppel. Importantly, in considering Mr. Trent's malpractice claim based on the right hip surgery, the trial court failed to apply Defendant-Appellee's alternative basis for summary judgment—the four-year absolute bar of § 2305.11 (B) Ohio Revised Code — reasoning that this statute had been impliedly vacated or modified by *Oliver v. Kaiser Community Health Found,* 5 Ohio St. 3d 111, 449 N.E. 2d 438 (1983).

By Notice of Appeal, filed November 30, 1984 Plaintiffs-Appellants appealed from the trial court's grant of summary judgment in favor of Defendant-Appellee Dr. Schlonsky with respect to Mr. Trent's left hip claim and Mrs. Trent's right hip consortium claim. Appellants primary argument was that the allegation that Dr. Schlonsky' left hip replacement was negligently performed, as first asserted in their Fourth Amended Complaint "related back" to the date of filing of their Third Amended Complaint on October 6, 1982. Alternatively, Appellants argued that the Third Amended Complaint, which incorporated by reference the previous complaints, containing allegations of product liability as to the left hip prosthesis, somehow asserted surgical negligence as to the left hip implant through the incorporated language.

By Notice of Appeal filed December 13, 1984 Defendant-Appellee Dr. Schlonsky appealed from the trial court's finding that Mr. Trent's right hip claim survived summary judgment because of some notion of estoppel and fraudulent concealment, and the court's finding that the four-year absolute bar asserted by Defendant-Appellee Dr. Schlonsky was not applicable, both of which findings led to the trial court's failure to fully grant Defendant-Appellee Dr. Schlonsky's motion for summary judgment.

On December 19, 1984, Plaintiffs-Appellants (Cross-Appellees) filed a Motion to Dismiss the Appeal of Defendant-Appellee Dr. Schlonsky, based upon lack of jurisdiction. On December 31, Defendant-Appellee Dr. Schlonsky filed his Response in Opposition to Motion of Plaintiffs-Appellants to Dismiss the Appeal of Defendant-Appellee Dr. Schlonsky.

The Court of Appeals issued an opinion and entry on October 10, 1985, in which the Plaintiffs-Appellants' Motion to Dismiss the Cross-Appeals was sustained, the Plaintiffs-Appellants' first assignment of error regarding the left hip claim was overruled and the Plaintiffs-Appellants' second assignment of error regarding the right hip consortium claim was sustained in part and overruled in part. The Plaintiffs-Appellants subsequently filed a Notice of Appeal to the Ohio Supreme Court on November 8, 1985.

On March 5, 1986, the Ohio Supreme Court overruled Plaintiffs-Appellants' Motion to Certify the Record, thereby declining to hear the case. Plaintiffs-Appellants thereafter requested the Ohio Supreme Court to reconsider its order, but the Ohio Supreme Court, by entry of April 23, 1986, once again declined to hear the appeal. (Note that the date of April 23, 1986 differs from the date alleged in the appendix to Plaintiffs-Appellants' Petition for Writ of Certiorari of May 14. This Defendant-Appellee knows nothing about a third entry of May 14 and asserts said entry does not exist).

As can be seen from the trial court's decision and the opinion of the state's intermediate court of appeals, both attached to Plaintiffs-Appellants' Motion for Writ of Certiorari, as well as the Propositions of Law filed by Appellants to the Ohio Supreme Court specifying the questions brought to that tribunal, a copy of which is attached hereto, at no time in the state court proceedings did Plaintiffs-Appellants ever raise an issue of federal statutory law nor did they assert any violation of the United States Constitution.

LEGAL ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

APPELLANTS' PETITION FOR WRIT OF CERTIORARI DOES NOT SPECIFICALLY ASSERT A JURISDICTIONAL GROUND, NOR WAS IT TIMELY ASSERTED.

Appellants allege jurisdiction of the United States Supreme Court by virtue of Title 28 U.S.C. § 1257 regarding reviews of decision from a state's highest court. According to such statute, review may be granted:

> "(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." Title 28 U.S.C. § 1257.

Obviouslv, no challenge to the validitv of any treaty or statute, federal or state, is made by Appellants. Apparently Appellants seek to enforce a "right. . . Specifically set up or claimed under the Constitution." Yet Appellants' argument cites no constitutional provision and directs the

Court's attention to no act violative of a constitutional provision. Appellants merely allege in their brief that, "Petitioners were denied due process of law when their Complaint was dismissed" (page 7, Motion for Writ of Certiorari), and "this Court should accept this case to undo a very great injustice" (page 11, Motion for Writ of Certiorari). Certainly a more specific challenge to violation of the Federal Constitution is necessary to raise jurisdiction under Title 28, U.S.C. § 1257.

But of even more interest is the timeliness of this Petition. Title 28, U.S.C. § 2101 (C) provides the time period for filing a Petition for Writ of Certiorari:

> "(C) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

The Ohio Supreme Court, by entry of March 5, 1986, overruled Appellants' Motion to Certify the Record of the intermediate court of appeals. Appellants had ninety days therefrom to file a petition or to obtain an extension of time. One or the other had to be achieved by June 3, 1986, ninety days after the March 5 entry. However, Appellants did not file their petition until October 10, 1986, and didn't even get an extension of time until July 25, 1986.

It is anticipated that Appellants will assert that their time period commenced to run on May 14, 1986, a date which, according to their appendix, the Ohio Supreme Court filed a Rehearing Entry denying further consideration of Appellants' Motion to Certify the Record. Ohio Supreme Court involvement in a civil action such as the present one is discretionary and is heard on the merits

only if a motion to certify the record is sustained. There is no provision in the rules of the Ohio Supreme Court for a reconsideration of that Court's determination not to hear an appeal. There is a provision of rehearing in Rule IX of the Ohio Rules of Practice of the Supreme Court which provides:

> "Section 1. Motion for Rehearing
> A motion of rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his memorandum contra."

The language of this rule indicates it is not available for a decision not to accept an appeal. Clearly it deals with a rehearing. In the instant case there was no original hearing, the case never having been accepted. The rule further indicates it must be filed within ten days of the Supreme Court's "decision ". Here, there was no decision. Since there is no such thing as a reconsideration of the Ohio Supreme Court's failure to certify the case, the document described as a rehearing entry in Appellants' Petition is not a document of legal meaning and cannot be the basis from which the ninety day period commences. The March 5 entry overruling certification is the order from which this Petition should have been made.

Yet even if Ohio permitted a procedure of reconsideration of Supreme Court failure to certify a case, Appellants would still have to appeal from the March 5, 1986, Supreme Court entry. The March 5, 1986, entry established the finality of judgment through the state court process. The later entry on reconsideration said no more than that the Ohio Supreme Court declined to think about the

case any more. Appellants bring to this Court the final judgment of the Ohio Courts, not the question of whether such final judgment might be reconsidered. While not binding upon the Ohio Supreme Court, The Ohio Rules of Appellate Procedure do state Ohio's policy regarding reconsideration:

> "Rule 26 Application for Reconsideration
>
> . . . The filing of an application for reconsideration does not extend the time for filing a notice of appeal in the court of appeals."

Appellants have offered no authority, nor has Appellee discovered any, supporting the notion that filing a motion for reconsideration of the Ohio Supreme Court's failure to consider a case (assuming there is a vehicle for such reconsideration) operates to extend the period in which a Petition for Writ of Certiorari must be filed in this Court.

Yet even more questionable is Appellants' timeliness if calculated from the date of rehearing entry. Though the appendix of Appellants' petition contains on page A1 a purported restatement of the Ohio Supreme Court's Rehearing Entry, such page is different from the copy of the Ohio Supreme Court's official document served upon this Appellee by reason of the date. While page A1 reflects a date of May 14, 1986, the document actually signed by Ohio Chief Justice Frank D. Celebrezze bears the date of April 23, 1986, as the date of entry. Using the April 23, 1986, date, Appellants would have a duty to file a Petition for Writ of Certiorari or obtain an extension therefore no later that July 22, 1986, ninety days thereafter. Mr. Chief Justice Berger did not grant Appellants an extension until July 25, 1986.

For all of the above reasons, the Petition for Writ of Certiorari was not timely brought and therefore must be denied.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILURE TO PRESENT ON ITS FACE A SUBSTANTIAL FEDERAL QUESTION.

A. For This Court To Grant A Writ Of Certiorari, There Must Appear A Substantial Federal Question.

For the United States Supreme Court to review the action of a state court of final resort, there must appear a substantial federal question. *Durley v. Mayo*, Fla, 1956, 76 S. Ct. 806, 351 U.S. 277, 100 L Ed 1178, rehearing denied 77 S. Ct. 22, 352 U.S. 859, 1 L Ed 2d 69; *Newsom v. Smyth*, Va, 1961, 81 S. Ct. 774, 365 U.S. 604, 5 L Ed 2d 803.

This case involves a string of amended complaints and their applicability to the Ohio statute of limitations. The case is decided upon the interpretation of the Ohio statute of limitations for medical malpractice; the effect under Ohio procedure of incorporation by reference of allegations in one amended complaint into another, and the relation back of an amended pleading to the date of filing of the original pursuant to the Ohio Civil Rules regarding relation back. No federal statute, treaty, or constitutional provision has any bearing upon these issues.

B. For This Court To Grant A Writ Of Certiorari It Must Be Demonstrated That A Substantial Federal Question Was Presented In The State Court.

For this Court to review the decision of the Ohio Supreme Court, it must be shown not only that the case involves a substantial federal question, but the federal question was presented and ruled upon by the state court.

Rule 17.1 (b) and (c) of the Supreme Court Rules permits the granting of certiorari to review a state court decision only where the state court has ruled upon a federal question. Absence of a showing upon the record that the state court decided a federal question removes jurisdiction from this Court; *Illinios v. Gates*, Ill, 1983, 103 S. Ct. 2317 rehearing denied 104 S. Ct. 33; *Webb v. Webb*, Ga, 1981, 101 S. Ct. 1889, 451 U.S. 493, 68 L Ed 2d 392; *Tacon v. State of Arizona*, Ariz, 1973, 93 S. Ct. 998, 410 U.S. 351, 35 L Ed 2d 346.

A review of the decision of the Ohio Court of Appeals found on page A33 of Appellants' appendix indicates that no federal questions and in particular no questions of due process were even presented to the intermediate court of appeal, let alone ruled upon. Since the Ohio Supreme Court declined to hear the case, the state courts, on the face of this record, never decided a federal question. Therefore, there is no basis for this appeal.

C. There Can Be No Intervention By The United States Supreme Court Where The Record Demonstrates That The State Court Acted Upon An Adequate Independent Non Federal Basis.

Even if a federal question had been presented below and ruled upon, this Court would still decline jurisdiction if there were a non federal basis for the state court's decision sufficient to sustain its position. See *Dixon v. Duffy*, Cal, 1951, 72 S. Ct. 10, 342 U.S. 33, 96 L Ed 46 and *Young v. Ragen*, Ill, 1949, 69 S. Ct. 1073, 337 U.S. 235, 93 L Ed 1333.

The questions decided by the Ohio courts in this case rested solely upon interpretation of the Ohio Civil Rules and the Ohio statutes of limitation. The "pleading technicality" mentioned in the Petition as the basis for the Ohio court's decision is, without argument, a reference to interpretation of Ohio Civil Procedure. The non federal

portion of the decisions by the Ohio courts were not only independent and adequate, they were the only basis for the court's ruling.

III. THE QUESTIONS RAISED IN APPELLANTS' PETITION FOR WRIT OF CERTIORARI ARE SO UNSUBSTANTIAL AS TO NOT MERIT RE-VIEW BY THIS COURT.

Rule 16.1 (c) of the Supreme Court Rules provides as a basis for dismissal of an appeal, and thus arguably a denial of a Writ of Certiorari, a demonstration that the issues raised are so unsubstantial as not to need further argument. While no doubt in the eves of the Appellants this case is very substantial, substantiality is measured not by the magnitude of importance to one plaintiff, but rather the significance of the legal issues debated herein.

The legal issues in this case involve the adequacy of pleading and clarity of notice to the defendant. By the record it appears Appellants filed some seven complaints including all the amendments and by Appellants' count they contained 177 separate paragraphs. Those 177 paragraphs didn't count the paragraphs worded to the effect "Plaintiff hereby incorporates all paragraphs in all preceding complaints." Appellants' basic contention is that somewhere amongst this barrage of allegations and incorporated allegations there must have been some assertion of physician negligence regarding the left hip made in a timely fashion.

This pleading morass is so atypical that a decision crafted by this Court to give remedy to Appellants would necessarily be applicable to cases involving at least two separate acts of independent negligence, involving at least multiple amended complaints wherein allegations of negligence are identified by applying the negligent assertions in one one complaint to acts alleged in another complaint. The deci-

sion to be so specialized as to be virtually inapplicable to any other case likely to be filed in any of our fifty states. As such, the questions are truly unsubstantial.

CONCLUSION

For the reasons that:

(1) This Petition was not timely filed;

(2) This case does not reveal that federal questions were raised or decided in the state court;

(3) The state court decision stands on adequate and independent grounds: and

(4) The questions brought to this Court for review are unsubstantial.

Appellants' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(Counsel of Record)
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614/227-2300

Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing, Respondents' Brief in Opposition have been served upon petitioners, John and Mary Trent, by mailing such copies to the office of petitioners' counsel of record, Robert C. Paxton II, 88 East Broad Street, Suite 1590, Columbus, Ohio 43215, by U.S. Mail First Class postage prepaid, this day of November, 1986.

I further certify that all parties required to be served have been served.

MICHAEL J. RENNER
Attorney for Respondent
Dr. Joseph Schlonsky

APPENDIX A

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM

To wit: March 5, 1986

John and Macy Trent *Appellant,*	:	
	:	Case No. 85-1890
v.	:	ENTRY
Codman and Shurtleff, Inc. et al., *Appellees.*	:	

Upon consideration of the motion for an order directing the Court of Appeals for Franklin County to certify its record it is ordered by the Court that said motion is overruled.

COSTS :

Motion Fee, $20.00, paid by Robert C. Paxton, II.

(s) Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date. . . . . .

JAMES WM. KELLY CLERK
(s)Sam F. Adkins DEPUTY

APPENDIX B

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM

To wit: April 23, 1986

John and Macy Trent	:	Case No. 85-1890
Appellant,	:	
v.	:	REHEARING ENTRY
Codman and Shurtleff, Inc.	:	(Franklin County)
et al.,	:	
Appellees.	:	

It is ordered by the Court that rehearing in this case be, and the same is hereby, denied.

(s) Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 23rd day of April, 1986.

JAMES WM. KELLY CLERK
(s)Daniel J. Crowley DEPUTY

APPENDIX C

IN THE SUPREME COURT OF OHIO

JOHN TRENT AND MACY TRENT :
Appellants, :

vs : Case No. 85-1890

CODMAN AND SHURTLEFF, INC., :
et al.,
Appellees :

MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION

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APPENDIX D

Rule 16. Motion to dismiss or affirm reply supplemental briefs

1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 29.4, the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate nonfederal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

APPENDIX E

PART V—JURISDICTION ON WRIT OF CERTIORARI

RULE 17. Considerations governing review on certiorari

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

APPENDIX F

RULES OF PRACTICE OF THE SUPREME COURT (OHIO)

RULE IX

MOTION FOR REHEARING AND ISSUANCE OF MANDATE

SECTION 1. Motion for Rehearing.

A motion for rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his memorandum contra.

SECTION 2. Issuance of Mandate.

Ten days after the announcement of a decision on the merits, unless a motion for rehearing is filed, the Clerk shall issue a mandate in conformity to the entry of the Court. If a motion for rehearing is filed and denied, the mandate shall issue at the same time as the decision on the motion for rehearing. No mandate shall issue on denial of a motion to certify or a motion for leave to appeal, or upon the sustaining of a motion to dismiss an appeal as one not involving a substantial constitutional question.

APPENDIX G

RULES OF APPELLATE PROCEDURE (OHIO)

Rule 26. Application for reconsideration

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration does not extend the time for filing a notice of appeal in a court of appeals.

Parties opposing the application must answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served as prescribed for the service and filing of briefs in the initial action. Oral arguments of an application for reconsideration shall not be permitted except at the request of the court.

(Amended, eff 7-1-75)

APPENDIX H

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority excercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX I

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.